ALA UDDIN v. KETUA PENGARAH IMIGRESEN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[CRIMINAL APPEAL NO: WA-44-110-07-2018]
11 SEPTEMBER 2018

PREVENTIVE DETENTION: *Detention order – Habeas corpus – Application for – Being in country without lawful permit – Applicant working in country despite not being in possession of valid permits and pending registration with Rehiring Programme – Whether applicant's arrest, detention and removal valid – Whether there had been substantive and procedural non-compliance with provisions of s. 33(1) and 34(1) of Immigration Act 1959/63 ('IA') – Whether removal order issued against applicant bona fide – Whether in breach of art. 5(4) of Federal Constitution – Whether applicant breached s. 15(1)(c) of IA by virtue of presence in country after expiry of valid permit – Whether there was compliance with requirements of s. 51(1)(b) of IA in respect of granting of detention order – Whether detention order regular*

IMMIGRATION: *Detention – Being in country without lawful permit – Applicant working in country despite not being in possession of valid permits and pending registration with Rehiring Programme – Habeas corpus – Application for – Whether applicant's arrest, detention and removal valid – Whether there had been substantive and procedural non-compliance with provisions of s. 33(1) and 34(1) of Immigration Act 1959/63 ('IA') – Whether removal order issued against applicant bona fide – Whether in breach of art. 5(4) of Federal Constitution – Whether applicant breached s. 15(1)(c) of IA by virtue of presence in country after expiry of valid permit – Whether there was compliance with requirements of s. 51(1)(b) of IA in respect of granting of detention order – Whether detention order regular*

This was an application for *habeas corpus* for an order for the immediate release of the applicant from detention which was alleged to be defective and unlawful. On 4 May 2018, the applicant had been arrested and investigated under s. 51(b) of the Immigration Act 1959/63 ('the IA') for being in the country without a lawful permit. At the time of arrest, the applicant was working as a cutter in the assembling process of advertising billboard at the said premises. The applicant admitted to the immigration officers that he had been working at the premises for six months and was paid RM55 per day. Investigations subsequently revealed that the applicant was in possession of a Pas Pekerjaan (PLKS) with MKAP Bina Sdn Bhd which expired on 18 January 2018 as well as a Pas Khas which had also expired on 27 March 2018. It was also discovered that the applicant had even on 27 November 2017 registered with the Rehiring Programme (Program Penggajian Semula Pekerja Asing) with the firm of RRS Kapotakha (M) Sdn Bhd. This registration was still pending the requisite process with the Immigration

Department. On 28 May 2018, a detention order and a removal order under ss. 34(1) and 33(1) of the IA were issued against the applicant respectively. The applicant filed a notice of motion seeking, *inter alia*, a declaration that his arrest, detention and removal was invalid. The applicant asserted that there had been a substantive and procedural non-compliance with the provisions of s. 33(1) and 34(1) of the IA, and that the removal order against the applicant was issued *mala fide* and in breach of the applicant's fundamental rights under art. 5(4) of the Federal Constitution. The thrust of the applicant's argument was that he had been arrested, detained and ordered to be removed from Malaysia by the respondents despite the applicant having registered with the Rehiring Programme, and notwithstanding that the delay in the registration process to issue special work conditional passes to the applicant and his identified employing firm was attributed to the Immigration Department and the vendor appointed to the program, namely MyEG Sdn Bhd. The resistance of the respondents to this application was premised on the stance that there were no flaws in the detention and removal orders issued under the IA, with emphasis on the fact that despite not being in possession of any valid permits, the applicant was caught working when arrested.

Held (dismissing application for writ of *habeas corpus*):

(1) This court could not subscribe to the view that one was no longer a PATI once registered in the Rehiring Scheme. If this were the position, one could easily register and divest oneself from the PATI status, and then validly disappear, defeating the very purpose of the Rehiring Programme, which is to better regulate the scourge of illegal immigration in the country. Just because the applicant had registered and which process was still pending did not mean that he was free to work anywhere he so chose as he had still not been issued with the requisite PLKS. Working at a place other than the one registered for the Rehiring Programme was clearly contrary to the objective of the Government and the Immigration Department introducing the scheme in the first place. Employing a person without a valid pass was also an offence under s. 55B of the IA. (paras 29-31)

(2) The breach of s. 15(1)(c) of the IA was determined to have been occasioned by the applicant by virtue of his presence in the country after the expiry of a valid permit; and despite having been registered with the Rehiring Programme (which did not in any event change the fact of the absence of valid permit), working at a place different from the one being earmarked for registration. Surely, this would be a decision that could be legitimately arrived at by the Director General of Immigration (as may be lawfully delegated under s. 3(3) of the IA) *vis-a-vis*

considerations on the Rehiring Programme and the objective of regulating illegal immigration, within the ambit of the wide supervision and direction powers statutorily vested in him. (para 36)

(3) Under the IA, the applicant could only challenge the validity of the removal or detention order on the ground of non-compliance with any procedural requirements but nothing else. The legislative scheme of the IA already deemed the applicant to be in lawful custody given the fact that he had been detained at an immigration depot (s. 51B of the IA). Furthermore, there could be no procedural non-compliances with the detention or removal orders issued against the applicant because the continued detention of the applicant since his arrest had been made subject to successive remand orders duly granted by a Magistrate. Any argument of any alleged illegality in the arrest and detention of the applicant by reason of the re-hiring issue could not therefore defeat the validity of the current detention order which was lawful for being in adherence to the provisions of art. 5(4) of the Federal Constitution requiring the detention be with the authority of the Magistrate. As such, the respondents' compliance with the requirements of s. 51(5)(b) of the IA in respect of the granting of the detention order under the authority of the Magistrate could not therefore cause any infirmity on the removal and detention orders issued under ss. 33 and 34 of the IA; but should instead be construed as eliminating any alleged irregularities on the detention of the applicant. (paras 38, 41-43 & 47)

(4) The *habeas corpus* application was a challenge against the current detention order under s. 34(1). But the statutory pre-requisites to the issuance of detention order under s. 34(1) were unconcerned with the grounds for the making of the preceding removal order under s. 33(1). The detention order was based on the issuance of the removal order. Any alleged prior illegality affecting the removal order could not operate to impair the validity of the issuance of the detention order, which the law considered to be valid and free from any defects or procedural non-compliance. Thus, the detention order issued under s. 34(1) of the IA was regular. (paras 54-56)

Case(s) referred to:

Andrew Thamboosamy v. Superintendent of Pudu Prisons, Kuala Lumpur [1976] 1 LNS 5 FC ***(refd)***

Lee Kew Sang v. Timbalan Menteri Dalam Negeri Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***

Mohammad Jafor Hossain lwn. PP [2017] 8 CLJ 717 HC ***(dist)***

Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 4 CLJ 613 FC ***(refd)***

Pua Kiam Wee v. Ketua Pengarah Imigresen Malaysia & Anor [2018] 4 CLJ 54 CA ***(refd)***

Re Meenal w/o Muniyandi [1979] 1 LNS 89 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25(1)
Criminal Procedure Code, s. 365
Federal Constitution, art. 5(4)
Immigration Act 1959/63, ss. 3(2), (3), 6(1)(c), 9, 15(1)(c), 33(1), 34(1), 51(5)(b), 55B, 60

For the applicant - Harpal Singh; M/s T Harpal & Assocs
For the respondant - Norelisha Farhana; SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Nazlan Ghazali J:

Introduction

[1] This is an application for *habeas corpus* for an order for the immediate release of the applicant from detention which is alleged to be defective and unlawful.

[2] Following the conclusion of the hearing of the application, I dismissed the application, and highlighted the primary reasons for the same. This judgment contains the full reasons for the dismissal.

Key Background Facts

[3] The applicant, with six other individuals were on 4 May 2018 arrested by immigration officers in an operation at the premises of one Muhibah Konsortium Holding Sdn Bhd in Kajang.

[4] At the time of arrest, the applicant was working as a cutter in the assembling process of advertising billboard at the said premises. Then, the applicant admitted to the immigration officers that he had been working at the premises for six months already, and was paid RM55 per day.

[5] The applicant was then arrested and investigated under s. 51(b) of the Immigration Act 1959/63 ("the IA") for being in the country without a lawful permit.

[6] Investigations subsequently revealed that the applicant was in possession of a Pas Pekerjaan (PLKS) with MKAP Bina Sdn Bhd which expired on 18 January 2018, as well as a Pas Khas which had also expired on 27 March 2018.

[7] It was also discovered that the applicant had even on 27 November 2017 registered with the Rehiring Program (Program Penggajian Semula Pekerja Asing) with the firm of RRS Kapotakha (M) Sdn Bhd. This registration is still pending the requisite process with the Immigration Department.

[8] On 28 May 2018, a Timbalan Penolong Pengarah Imigresen, Logusferi Subramaniam issued against the applicant a detention order and removal order under ss. 34(1) and 33(1) of the IA, respectively. An appeal against the removal order by the applicant under s. 34 has also been dismissed by the first respondent.

[9] On 11 June 2018, the applicant was sent to the Depot Imigresen Semenyih by the Immigration Department's Bahagian Pengurusan Depot dan Tahanan Ibu Pejabat Putrajaya. On the same day, the Bangladesh Government issued a travel permit for the purpose of facilitating the deportation of the applicant back to his home country of Bangladesh.

The Application

[10] On 12 July 2018, the applicant filed a notice of motion seeking the various orders and reliefs as follows:

> [1] Perintah bahawa Pemohon dihadapkan dan/atau dibawa ke Mahkamah Yang Mulia ini untuk tujuan dan selama perbicaraan permohonan di sini.
>
> [2] Deklarasi bahawa penangkapan, penahanan dan pengusiran Pemohon adalah tidak sah, salah dan satu nuliti setelah berdaftar di bawah Program Rehiring yang dianjurkan oleh kerajaan.
>
> [3] Deklarasi sama ada setelah berdaftar di bawah Program Rehiring dengan dilantik oleh Kementerian Dalam Negeri dan membayar levi pas pembayaran pendaftaran kepada vendor yang bekerja, pemohon boleh ditangkap, ditahan, dituduh dan diusir sebelum prosesnya selesai.
>
> [4] Deklarasi bahawa kecuai dan kelewatan di dalam pengendalian proses Program Rehiring oleh vendor yang dilantik oleh KDN boleh menyebabkan majikan gagal mendapatkan permit bekerja dalam jangkamasa yang ditetapkan oleh Jabatan Imigresen Malaysia dan Pemohon boleh ditahan, dituduh dan diusir.
>
> [5] Perintah bahawa writ *habeas corpus* dikeluarkan bagi Pemohon dihadapkan dan/atau dibawa ke Mahkamah Yang Mulia ini untuk dibebaskan.
>
> [6] Selanjutnya dan selepas Pemohon dibebaskan, perintah bahawa Pemohon tidak dapat ditangkap dan/atau ditahan semula dan proses di bawah Program Rehiring dibenarkan sehingga selesai oleh Jabatan Imigresen Malaysia dan bukannya vendor yang dilantik oleh KDN.
>
> [7] Bahawa pihak-pihak mempunyai kebebasan untuk memohon.
>
> [8] Perintah-perintah dan/atau arahan-arahan lain yang difikirkan patut dibuat atau diberi oleh Mahkamah Yang Mulia ini.

The Primary Contentions Of The Parties

[11] The applicant anchors his application on a number of grounds, but the primary assertion is that there had been substantive and procedural non-compliance with the provisions of s. 33(1) and 34(1) of the IA, and that

the removal order against the applicant dated 28 May 2018 was issued *mala fide* and in breach of the applicant's fundamental rights under art. 5(4) of the Federal Constitution.

[12] The thrust of the argument of the applicant, as highlighted by his counsel at the hearing, is that the removal order of the applicant was defective and not valid because the applicant had been arrested, detained and ordered to be removed from Malaysia by the respondents despite the applicant having registered with the rehiring scheme, and notwithstanding that the delay in the registration process to issue special work conditional passes to the applicant and his identified employing firm was attributed to the Immigration Department and the vendor appointed for the program, namely MyEG Sdn Bhd.

[13] The Rehiring Scheme or Program Penggajian dan Penempatan Semula was introduced by the Government to enable illegal immigrants or Pendatang Asing Tanpa Izin ("PATI") be granted Pas Lawatan Sementara to continue working with their employers.

[14] The resistance of the respondents to this application is premised on the stance that there were no flaws in the detention and removal orders issued under the IA, with emphasis on the fact that despite not being in possession of any valid permits, the applicant was caught working when arrested. The respondents also take issue with the nature of the application filed by the applicant, which according to the respondents ought not to have been made for a writ of *habeas corpus*, and that in any event there are defects in the intitulements of the application.

Evaluation And Findings Of This Court

Basis Of Detention

[15] The challenge for a writ of *habeas corpus* in the instant application is against the arrest, detention and removal of the applicant. But it is trite that a writ of *habeas corpus* is applied for to secure the release of a person claimed to be unlawfully detained or imprisoned. This is manifest from the basis of the exercise of such powers, as embodied in art. 5 of the Federal Constitution, s. 25(i) of the Courts of Judicature Act 1964 and s. 365 of the Criminal Procedure Code. So the focus should be on the detention, as opposed to the arrest and the removal of the applicant.

[16] The detention is also in the instant case before me the final of the three actions taken by the respondents herein, which started with the arrest of the applicant, the issuance of a removal order against him, and then the current detention order pending removal from the country.

[17] Detention of a person intended to be removed from this country is provided for under s. 34 of the IA. Section 34 permits detention of those ordered to be removed as may be the necessary arrangement pending deportation. Section 34 of the IA reads as follows:

34 Detention of persons ordered to be removed

(1) Where any person is ordered to be removed from Malaysia under this Act, such person may be detained in custody for such period as may be necessary for the purpose of making arrangements for his removal:

Provided that any person detained under this subsection who appeals under subsection 33(2) against the order of removal may, in the discretion of the Director General, be released, pending the determination of his appeal, on such conditions as to furnishing security or otherwise as the Director General may deem fit.

(2) Subject to the determination of any appeal under section 33, any person who is ordered to be removed from Malaysia may be placed on board a suitable vessel or aircraft by any police officer or immigration officer, and may be lawfully detained on board the vessel or aircraft, so long as the vessel or aircraft is within the limits of Malaysia.

(3) Any person who is detained in custody in pursuance of an order made by the Director General under subsection (1) may be so detained in any prison, police station or immigration depot, or in any other place appointed for the purpose by the Director General.

[18] Section 34(1) therefore plainly states that a person intended to be removed from Malaysia may be detained under s. 34. The one and only basis of a detention under s. 34(1) is the prior issuance of an order of removal in respect of the same person under s. 33(1).

[19] An order for removal of persons unlawfully remaining in Malaysia is provided for under s. 33(1) of the IA. Section 33 states as follows:

33 Removal of persons unlawfully remaining in Malaysia

(1) Where the presence of any person in Malaysia is unlawful by reason of section 9, 15 or 60 the person shall, whether or not any proceedings are taken against him in respect of any offence against this Act, be removed from Malaysia by order of the Director General.

(2) Any person in respect of whom an order of removal has been made under subsection (1) may appeal to the Minister* in such manner and within such time as may be prescribed:

Provided that there shall be no appeal under this subsection against an order of removal under subsection (1) made in respect of any person whose presence in Malaysia is unlawful under section 9 by reason of any order made under paragraph 9(1)(a) or by reason of the cancellation of a Pass or Permit under paragraph 9(1)(b) or 9(1) (c) respectively, or unlawful under paragraph 15(1)(c) or section 60 by reason of the expiry of any Pass relating to or issued to him.

[20] Section 33(1) may only be invoked for any such person intended to be removed from the country by the order of the Director General of Immigration if the presence of any such person in Malaysia becomes

unlawful under either ss. 9, 15 or 60 of the IA. No less crucially, such removal order shall be made whether or not any proceedings are taken against such person in relation to any offence under the IA.

[21] In this case, the detention order dated 28 May 2018 issued under s. 34(1) is stated to be on account of an order for removal of the applicant issued under s. 33(1) on the same date. The s. 33(1) removal order is specified to be premised on the commission by the applicant of an offence under s. 15(1)(c) of the IA. This is the ground of the person overstaying his presence in this country, given the expiry of his entry permit.

[22] Section 15 concerning unlawful entry or presence in Malaysia provides as follows:

> 15 Unlawful entry or presence in Malaysia
>
> (1) Without prejudice to any other provision of this Act prohibiting a person from remaining in Malaysia, a person shall not remain in Malaysia:
>
> (a) after the cancellation of any Permit or Certificate under this Part;
>
> (b) after the making of a declaration under subsection 14(4);
>
> (c) after the expiration of the period of any Pass relating to or issued to him; or
>
> (d) after the notification to him, in such manner as may be prescribed, of the cancellation, under any regulations made under this Act, of any Pass relating to or issued to him,
>
> unless he is otherwise authorised to remain in Malaysia under this Act.
>
> (2) A person shall not remain in Malaysia in contravention of proviso (a) to section 60 or of article 8(2) of the Immigration (Transitional Provisions) Order 1963 [L.N. 226 of 1963].
>
> (3) (Deleted by Act 27 of 1963).
>
> (4) Any person who without reasonable cause contravenes this section shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.

[23] This fact is not in dispute. When arrested on 4 May 2018, and as stated above, the applicant's PLKS had earlier expired on 18 January 2018 and his special pass too was valid only until 27 March 2018. To that extent plainly an offence may have been committed under s. 15(1)(c) of the IA. On this basis, the respondents invoking ss. 33(1) and 34(1) of the IA could not be said to be in any fashion flawed or defective.

[24] However, the respondent, acknowledged that the applicant had registered in the rehiring scheme or Program Penggajian dan Penempatan Semula introduced by the Government to enable illegal immigrants or Pendatang Asing Tanpa Izin ("PATI") be granted Pas Lawatan Kerja

Sementara (PLKS) to continue working with their employers. It is also not disputed that the registration work process in respect of the applicant is delayed and still pending. When arrested, the applicant admitted that he had been working at a place other than the one registered under the rehiring scheme, for some six months.

[25] The thrust of the *habeas corpus* application is that the order of removal and detention are defective since they could not have been applied to the applicant who, according to the learned counsel for the applicant, is not a PATI on account of the fact that he had been registered with the Rehiring Scheme run by the Immigration Department.

[26] The applicant places much reliance on the decision of the High Court in *Mohammad Jafor Hossain lwn. PP* [2017] 8 CLJ 717. In that case, the applicant, who like the applicant in the instant case before me, had registered with the Rehiring Scheme was, unlike the applicant in the instant case, convicted of the offence of entering the country without a valid pass under s. 6(1)(c) of the IA. However, the conviction and sentence imposed by the Sessions Court were set aside and the applicant ordered to be freed on the overriding basis that his registration for the Rehiring Scheme meant that he was no longer a PATI. Consequently, this meant that he could not have been charged under s. 6(1)(c).

[27] The following passages from the judgment of the High Court made the position very clear:

> [7] Pemohon di dalam semakan ini telah mengambil peluang ini untuk mendaftarkan dirinya di bawah program ini pada 20 April 2016 dengan "MyEG", resit bayaran pendaftaran oleh "MyEG" adalah disertakan seperti di dalam lampiran 6 tersebut. Pemohon juga telah membuat bayaran sebanyak RM1,134.52. Majikan pemohon adalah LZH Construction Solutions.
>
> [8] Maka, menurut peguambela, apabila seorang PATI telah mendaftar dirinya di bawah program ini, maka syarat-syarat yang disebut oleh Ketua Pengarah Imigresen adalah terpakai ke atasnya, iaitu beliau boleh terus bekerja dengan majikannya, sehingga proses pemutihan atau dokumentasi selesai untuk beliau bekerja dengan sah di Negara ini.
>
> [9] Setelah meneliti dokumen-dokumen yang disertakan bersama-sama permohonan ini, saya bersetuju dengan hujah peguambela tersebut. Pemohon walaupun tidak lagi memiliki permit pekerjaan yang sah, akan tetapi selepas didaftarkan dengan "MyEG" maka status beliau sebagai "PATI" di Negara ini telah berubah kepada "PATI" yang dibenarkan untuk tinggal di Negara ini sehingga proses pendaftaran oleh "MyEG" selesai.
>
> [10] Pemohon di sini mempunyai majikan iaitu LZH Construction Solutions. Beliau telah membayar sejumlah RM1,134.52 kepada pihak "MyEG" untuk program "rehiring" tersebut. Pemohon di sini telah membuktikan dirinya bukanlah "PATI" selepas membuat pendaftaran tersebut.

A [11] Pada pendapat saya, pihak imigresen tidak boleh menuduh pemohon selepas beliau mengikuti program "rehiring" ini, jika tidak, pihak Kerajaan boleh dipertanggungjawabkan sebagai menipu "PATI", kerana walaupun mereka telah berdaftar dengan "MyEG" dan membuat bayaran tertentu tetapi mereka boleh lagi ditangkap dan dituduh di mahkamah sebagai seorang "PATI".

B [12] Pemohon, pada pendapat saya telah berjaya membuktikan bahawa beliau bukanlah "PATI" pada saat dia ditangkap oleh pihak imigresen.

[13] Berdasarkan kepada alasan-alasan di atas, saya telah membenarkan permohonan semakan oleh pemohon ini. Oleh itu perintah dan hukuman Majistret pada 27 September 2016 diketepikan. Pemohon diperintah untuk
C dibebaskan tanpa apa-apa syarat.

[28] It is clear from the judgment of the High Court in *Mohammad Jafor Hossain lwn. PP* that a person who had registered with the Rehiring Scheme should be considered either as a PATI who is permitted to remain pending
D completion of the process or as one who is no longer a PATI.

[29] I do not, with respect, agree that just because the applicant has registered in the Rehiring Scheme, his status becomes a PATI who can remain in the country. In my view, this is only true for as long as the applicant abides by all matters concerning the scheme. Just because he has
E registered and which process is still pending does not mean he is free to work anywhere he so chooses. He has still not been issued with the requisite PLKS.

[30] Working at a place other than the one registered for the Rehiring Scheme is clearly contrary to the objective of the Government and the
F Immigration Department introducing the scheme in the first place. In fact, employing a person without a valid pass is also an offence under s. 55B of the IA which states:

55B Employing a person who is not in possession of a valid Pass

G (1) Any person who employs one or more persons, other than a citizen or a holder of an Entry Permit, who is not in possession of a valid Pass shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than ten thousand ringgit but not more than fifty thousand ringgit or to imprisonment for a term not exceeding twelve months or to both for each such employee.

H (2) A Pass lawfully issued to any person shall cease to be a valid Pass when any of its terms and conditions is contravened.

...

[31] As such, I cannot subscribe to the view that one is no longer a PATI
I once registered in the Rehiring Scheme. If this were the position, one can easily register and divest oneself from the PATI status, and then validly disappears, defeating the very purpose of the Rehiring Scheme, which is to better regulate the scourge of illegal immigration in the country.

Wide Supervision Powers of the Director General

[32] In that context, I am of the view that since the Director General of Immigration is, as established by case law authorities, fully authorised under s. 3(2) to supervise and direct all matters concerning immigration in this country, the respondent was entirely empowered to apply s. 15(1)(c) in the manner that takes into consideration the re-hiring scheme as affirmed by the relevant affidavits of the respondents, the fact that the applicant has already registered and also that he was however working at a different place when arrested.

[33] Section 3 reads as follows:

> 3 Appointment and powers of Director General and others
>
> (1) The Yang di-Pertuan Agong may appoint a Director General of Immigration and one or more Deputy Directors General of Immigration for the purpose of this Act.
>
> (1A) The Minister may appoint so many Directors of Immigration and other senior immigration officers, of or above the rank of Deputy Assistant Director of Immigration, as he may consider necessary for the proper carrying out of this Act.
>
> (1B) The Director General may appoint so many immigration officers as he may consider necessary for the proper carrying out of this Act.
>
> (2) The Director General shall have the general supervision and direction of all matters relating to immigration throughout Malaysia.
>
> (3) The powers and discretions vested in the Director General by this Act, and the duties required to be discharged by him may, subject to section 4 and to such limitations as may be prescribed, be exercised and discharged by:
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> (a) a Deputy Director General of Immigration or Director of Immigration;
>
> (b) any senior immigration officer authorised in writing in that behalf by the Director General.

[34] The Court of Appeal in a recent decision in the case of *Pua Kiam Wee v. Ketua Pengarah Imigresen Malaysia & Anor* [2018] 4 CLJ 54, in the judgment of Idrus Harun JCA ruled that the broad supervision powers of the Director General of Immigration encompassed the power to bar a holder of a Malaysian passport from travelling abroad. Relevantly it was also held as follows:

> [12] It is enough, when dealing with this contention, to say that by virtue of s. 3(2) of Act 155, the first respondent has the necessary power to bar the appellant from leaving Malaysia. Section 3(2) of Act 155 is couched in broader terms as to vest powers in the first respondent to have the general supervision and direction of all matters relating to immigration throughout Malaysia. For convenience, we quote s. 3(2) of Act 155 below:

A 3. (2) The Director General shall have the general supervision and direction of all matters relating to immigration throughout Malaysia.

It seems to us, there can be little doubt that the decision to impose a ban on the appellant from going abroad for the reason that he is under police
B investigation surely relates to immigration matters under Act 155. We agree with the learned judge that the words "and direction to all matters relating to immigration" in s. 3(2) are readily capable of being construed to include a decision barring the appellant on appropriate ground from leaving the country. Therefore, when this court is called upon to determine the validity of the impugned decision, we are satisfied that the
C attempt by the appellant to persuade us to hold that the first respondent has acted without jurisdiction is completely untenable.

[35] As such, the fact that the Immigration Act does not expressly state that the Director General has the authority to ban Malaysian passport holders from travelling is thus immaterial. Section 3(2) of the IA is sufficiently wide
D to confer on the Director General such powers. Similarly, in the instant case before me, the argument of the counsel for the applicant that there is nothing in the IA which authorises the issuance of the removal or detention order in a situation where an applicant had registered with the Rehiring Scheme is irrelevant. The crux of the matter is the Director General had exercised its
E powers on the basis of a breach of s. 15(1)(c) which provides the valid premise for the issuance of a removal or detention order.

[36] The breach of s. 15(1)(c) was determined to have been occasioned by the applicant by virtue of his presence in the country after the expiry of a valid permit; and despite having been registered with the Rehiring Scheme
F (which does not in any event change the fact of the absence of valid permit), working at a place different from the one being earmarked for registration. Surely this would be a decision that could be legitimately arrived at by the Director General (as may be lawfully delegated under s. 3(3) of the IA), *vis-à-vis* considerations on the Rehiring Scheme and the objective of regulating
G illegal immigration, within the ambit of the wide supervision and direction powers statutorily vested in him.

[37] This finding on the validity of the detention order (and the removal order) is also consistent with the rulings in at least two previous cases on s. 34(1) of the 1A which had upheld the legality of the detention orders,
H namely in *Andrew Thamboosamy v. Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 1 LNS 5; [1976] 2 MLJ 156 and *Re Meenal w/o Muniyandi* [1979] 1 LNS 89; [1980] 2 MLJ 299.

Challenge Can Only Be On Procedural Non-compliance

I **[38]** Furthermore, under the IA, the applicant can only challenge the validity of the removal or detention order on the ground of non-compliance with any procedural requirements but nothing else. This was reaffirmed in

the same case of *Pua Kiam Wee v. Ketua Pengarah Imigresen Malaysia & Anor* which dealt with the point succinctly as follows:

> [10] We would, in dealing with the appellant's submission, begin by observing that the learned judge had determined that the appellant had no constitutional rights to travel overseas and that the travel ban was in accordance with the law. With this observation, we now quote the relevant s. 59A of Act 155:
>
> > 59A(1). **There shall be no judicial review in any court of any act done or any decision made** by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.
> >
> > (2) In this section, "judicial review" includes proceedings instituted by way of:
> >
> > (a) an application for any of the prerogative orders of *mandamus*, prohibition and *certiorari*;
> >
> > (b) an application for a **declaration** or an injunction;
> >
> > (c) any writ of *habeas corpus*; or
> >
> > (d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, by any provisions of this Act. (emphasis added)
>
> These provisions are crystal clear. It deals with exclusion of judicial review, which includes prerogative order of *certiorari*, in any court of any act or any decision made by the Director General of Immigration or the Minister. The section, however, provides a single instance where such act or decision is susceptible to judicial review and that instance is where it involves any question relating to compliance with any procedural requirement of Act 155 or the regulations governing that act or decision. In the absence of any such non-compliance with procedural requirement, it is patent that the exclusion of judicial review is exclusive and the court is precluded from reviewing any decision which the law in Act 155 has mandated to be irreviewable.

[39] This pronouncement is of course in line with settled authorities, such as the leading Federal Court decision on this point in *Lee Kew Sang v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 3 CLJ 914 where Abdul Hamid Mohamad FCJ held relevantly thus:

> In our view, courts must give effect to the amendments. That being the law, it is the duty of the courts to apply them. So, in a *habeas corpus* application where the detention order of the Minister made under s. 4(1) of the Ordinance or, for that matter, the equivalent ss. in ISA 1960 and DD(SPM) Act 1985, the first thing that the courts should do is to see

whether the ground forwarded is one that falls within the meaning of procedural non-compliance or not. To determine the question, the courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof. Only if there is that there can be non-compliance thereof and only then that the courts should consider whether, on the facts, there has been non-compliance.

Coming back to present case, both the grounds forwarded are clearly not within the ambit of the term "procedural non-compliance." There does not appear to be any provision in the law or the rules, neither were we shown such a provision, that requires the Minister to consider whether criminal prosecution ought to be taken against the appellant or that the order must be made within a certain period from the date of the alleged criminal acts. There being no such procedural requirement, there can never be non-compliance thereof. In other words, the grounds are not such that could be relied on in an application for *habeas corpus* by virtue of the provisions of ss. 7C(1) and 7D(c) of the Ordinance. On this ground alone, the application should have been dismissed.

Section 51B Of The Immigration Act Deems Custody Lawful

[40] In addition, s. 51B of the Immigration Act stipulates that a person who is being detained at an immigration depot shall be deemed to be in lawful custody. It provides thus:

51B Custody deemed lawful

A person:

(a) who is being taken to or from an immigration depot; or

(b) who is being detained at an immigration depot,

shall be deemed to be in lawful custody.

[41] The legislative scheme of the IA already deems the applicant to be in lawful custody given the fact that he had been detained at an immigration depot. As stated earlier, and as averred in the relevant affidavit supporting the resistance of this application by the respondents, the applicant had already on 11 June 2018 been sent to the Depot Imigresen Semenyih by the Immigration Department's Bahagian Pengurusan Depot dan Tahanan Ibu Pejabat Putrajaya.

Detention With Magistrate's Authority

[42] Furthermore, there could be no procedural non-compliances with the detention or removal orders issued against the applicant because the continued detention of the applicant since his arrest has been made subject to successive remand orders duly granted by a Magistrate.

[43] Any argument of any alleged illegality in the arrest and detention of the applicant by reason of the rehiring issue cannot therefore defeat the validity of the current detention order which is lawful for being in adherence to the provisions of art. 5(4) of the Federal Constitution requiring the detention be with the authority of the Magistrate. For completeness, art. 5(4) reads as follows:

> 5 Liberty of the person
>
> (4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:
>
> Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day:
>
> Provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words "without unreasonable delay, and in any case within twenty-four hours (excluding the time of any "necessary journey)" the words "within fourteen days" ...

[44] Affidavit evidence of the respondents shows that the applicant was had been arrested on 4 May 2018 was first brought before a Magistrate in Sepang on 17 May 2018 in compliance with s. 51(5)(b) which specifies that a person so detained must be brought before a Magistrate within 14 days if he is not earlier released, removed or charged.

[45] The pertinent part of s. 51(5)(b) reads:

> 51 Powers of search and arrest
>
> ...
>
> (5) Notwithstanding anything contained in this Act or in any subsidiary legislation made under this Act:
>
> ....
>
> (b) where any person other than a citizen is arrested or detained under this Act, whether for an offence against this Act or otherwise than for such offence, and has not been earlier released, or charged in court for an offence against this Act, or removed from Malaysia under this Act, he shall, within fourteen days of his arrest or detention, be produced before a Magistrate who shall make an order for his detention for such period as may be required by an immigration officer or a police officer for the purpose of investigations into an offence against this Act, or by an immigration officer for the purpose of either making inquiries, or effecting his removal from Malaysia, under this Act, ...

[46] The applicant has since the grant of the first order of detention by the Magistrate on 17 May 2018 for the period until 28 May 2018 been in fact produced before the Magistrate and the order to be detained was further renewed on a number of occasions subsequently, with the last Waran Menahan issued by the Sessions and Magistrate's Court in Sepang being on 8 August 2018, for the period until 15 August 2018.

[47] As such, the respondents' compliance with the requirements of s. 51(5)(b) of the IA in respect of the granting of the detention order under the authority of the Magistrate cannot therefore cause any infirmity on the removal and detention orders issued under ss. 33 and 34 of the IA; but should instead be construed as eliminating any alleged irregularities on the detention of the applicant.

Prior Defects, If Any, Are Irrelevant

[48] The detention and removal orders cannot be successfully set aside for another key reason. It is this. On the settled authority of the Federal Court decision in *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 4 CLJ 613; [2006] 1 MLJ 309, prior defects, if any, which I disagree exist, *vis-à-vis* the arrest and the removal order, are of no relevance to the current detention order.

[49] The relevant parts of the judgment of the Federal Court in *Mohd Faizal bin Haris* ruled as follows:

> [9] It is therefore clear that generally a writ of *habeas corpus* must be directed against the current order of detention even when the earlier arrest is irregular (see *Athanassiadis v Government of Greece* [1969] 3 All ER 293; *Ooi Ah Pua v. OC Criminal Investigation, Kedah Perlis* [1975] 2 MLJ 198). The exception to this rule can be gathered from the judgment of the Ontario Court of Appeal in *R v. Wishart* (1910) 18 CCC 146 referred to in the passage from JR Sharpe cited earlier. In that case, s. 8 of the Fugitive Offenders Act 1906 came up for consideration. It reads as follows:
>
> > Whenever a warrant has been issued in a part of His Majesty's dominions for the apprehension of a fugitive from that part who is or is suspected to be in or on the way to Canada, the Governor-General or a judge of a court, if satisfied that the warrant was issued by some person having lawful authority to issue the same, may indorse such warrant in manner provided by this Act, and the warrant so indorsed shall be a sufficient authority to apprehend the fugitive and bring him before a magistrate.
>
> [10] The fugitive was apprehended in Ireland and brought before the Police Magistrate in Canada without the warrant having been indorsed as provided by s. 8. In his application for a writ of *habeas corpus*, he claimed that the indorsement of the warrant was a condition precedent to the exercise of jurisdiction by the magistrate and since it was not done so his

arrest was unlawful with the result that the magistrate had no jurisdiction to enter upon the inquiry. His application was allowed and he was discharged. The principle of law that can be gleaned from this case is that where there is a statutory condition precedent to the making of an arrest it must be complied with in order to render the arrest lawful. In support of this view, reference may be made to *Re Tan Boon Liat @ Allen & Anor*; *Tan Boon Liat & Anor v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors*; *Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors*; *Subramaniam v .Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108 where Suffian LP said at p 109:

> In *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 1 MLJ 129 after the order of detention had been made against him, the Minister was required to do certain things, which Mr Karam Singh complained the Minister had not done. Here, on the other hand, the condition for the detention of the appellants after the period of three months is fundamental; that condition had to be satisfied before the order could be made; it was a condition precedent. Before the appellants could be further detained beyond three months the Board must have made recommendations on their representations. That condition precedent has not been satisfied and in my judgment their continued detention after that period was therefore unlawful, since it was not, in the words of art. 5(1), 'in accordance with law'.

[11] It follows that it is only when the wording of a statute requires a proper arrest as a condition precedent to the making of a subsequent detention order can a person make a valid complaint of the detention.

[12] The precondition to the exercise of jurisdiction under s. 6(1) is, *inter alia*, only a consideration of the report of investigation. There is no stipulation in s. 6(1) that it must be the result of a valid detention. The preparation of the report is governed by s. 4 pursuant to which any person may be examined and it is not confined to an examination of only the detained person. The report of investigation therefore has no direct link with the detention; the only one being that it may contain a statement from the detained person. It can still be considered by the Minister even if it contains a statement from a person whose detention under s. 3(1) is irregular. This is because just as in the case of the use of illegally obtained evidence in a court of law the Minister may also use such evidence subject to the weight to be attached to it. In this regard reference may be made to *Field's Law of Evidence* (12th Ed) Vol 1 where it says, on the authority of *Balwant Singh v. RD Shah Director of Inspection Income Tax* AIR 1969 Delhi 91, at p. 429:

> It is true that in appropriate cases the court may order restoration of the property illegally seized but so far as the use of information gathered as a result of such seizure is concerned, the court, **or the appropriate authority**, has in any case, acting within the law, the power to call for such information and property and use the same in evidence … The information gathered, therefore, can otherwise

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> be reached by the courts or **other concerned authorities**. … the records and information gathered as a result of illegal search and seizure can be used subject to the value to be attached to it or its admissibility in accordance with the law relating to evidence. (emphasis added.)

B

[13] It must be observed that in view of the subjective nature of the exercise of discretion by the Minister in ordering detention as enunciated in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129, the court is not to concern itself with the vagueness, sufficiency or relevancy of the grounds of detention. Thus, even if the report of investigation was prepared as the result of an illegal arrest the weight to

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be attached to it is a matter exclusively within the purview of the Minister. The court will not be concerned with the use of the report of investigation by the Minister. The consideration of a statement made by an illegally detained person cannot therefore be prohibited. The result is that the legality of the detention of a person under s. 3(2) is not a condition precedent to the making of a detention order against him under s. 6(1).

D

[14] The corollary is that a detention order can be made against a person under s. 6(1) even when his detention under s. 3(2) was irregular. The general rule that a writ of *habeas corpus* must be directed against the current order of detention therefore applies where a detention under s. 6(1) has been made subsequent to an arrest and detention under s. 3(1) and (2).

E

It follows that where a detention order has been made under s 6(1) the writ of *habeas corpus* must be directed only against that order even if the earlier arrest and detention are irregular. This view is supported by *Barnardo v. Ford* (1892) AC 326 where Lord Halsbury said that he could not agree to the proposition that if a court is satisfied that illegal detention has ceased before application for the writ has been made,

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nevertheless the writ might issue in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another. Thus, any irregularity in a detention order made under s. 3(2) when it has been superseded by one under s. 6(1) is not a relevant matter for consideration. In this regard, *The Law of Habeas Corpus*

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(2nd Ed) by RJ Sharpe says at p. 179:

> It has been held consistently that the relevant time at which the detention of the prisoner must be justified is the time at which the court considers the return to the writ. This rule means that nothing which has happened before the present cause of detention took

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> effect will be relevant to the issue before the court, unless by reason of some special consideration arising from the particular proceedings.

[15] And at p 186:

> On the present state of the law, in almost every instance, the

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> relevant time at which the detention is to be justified is the time at which the court considers the case. Prior illegality will not be relevant unless by reason of some special rule derived from the particular nature of the proceedings involved.

[50] The detention order under s. 34(1) of the IA is premised on the issuance of a removal order under s. 33(1) of the same Act. The removal order in turn was based on the finding of a breach of s. 15(1).

[51] But the present challenge is against the detention order, which is sought to be set aside and for the applicant be freed from detention. Yet the true complaint by the applicant is on the ground of his arrest under s. 15(1) which questioned whether the fact of the applicant having been registered with the Rehiring Scheme renders the basis relied on by the respondents of the breach under s. 15(1) to be untenable. I have shown earlier that this stance of the applicant is without merit.

[52] Regardless, what is more critical is that even if the complaint of the application were meritorious, which it is not, any such alleged flaw had only affected the arrest and the issuance of the removal order under s. 33(1) of the IA. It does not truly concern the detention order under s. 34(1) as well.

[53] In light of *Mohd Faizal bin Haris*, in the instant case before me, the statutory condition precedent to the issuance of the detention order under s. 34(1) is that a removal order had been issued under s. 33(1).

[54] The *habeas corpus* application is a challenge against the current detention order under s. 34(1). But the statutory pre-requisites to the issuance of a detention order under s. 34(1) are unconcerned with the grounds for the making of the preceding removal order under s. 33(1).

[55] At the risk of repetition, the detention order is based on the issuance of the removal order. Any alleged prior illegality affecting the removal order cannot operate to impair the validity of the issuance of the detention order, which the law considers to be valid and free from any defects or procedural non-compliance.

Conclusion

[56] In view of the foregoing reasons, it is my judgment that the detention order issued under s. 34(1) of the IA is regular. As such, the application for a writ of *habeas corpus* is hereby dismissed.